IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 09-0659

C.A. GRENZ,
Petitioner and Appellee,

-vs-

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,
Respondent and Appellant,

and JOHN AND ANGELA HEITZ,
Respondents.

On Appeal from the Montana Sixteenth Judicial District Court, Garfield County
The Honorable Gary Day, Presiding
Garfield County District Court Cause No. DV-17-2008-2911

APPELLANT, STATE OF MONTANA'S APPEAL BRIEF AND APPENDICES

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I. STATEMENT OF THE ISSUES

1. Whether the District Court erred in invalidating a portion of ARM 36.25.125 which allows new State grazing lessees to determine what moveable improvements they wish to acquire upon the transfer of a State grazing lease?

2. When valuing the improvements upon the transfer of a State Grazing lease, whether DNRC must include a valuation of the movable improvements which have been rejected for use by the new State grazing lessee?

II. STATEMENT OF THE CASE

This case arises from a dispute over the value of moveable grazing lease improvements upon a State of Montana grazing lease. The valuation of State grazing lease improvements occurs when the grazing lease is transferred from a former grazing lessee to a new grazing lessee. Once this value is determined, the new grazing lessee is obligated to pay this value to the former grazing lessee.

The above-captioned matter is a Petition for judicial review brought by Mr. C.A. Grenz, a former State grazing lessee, to review the DNRC's determination of the value of improvements upon State of Montana Agricultural and Grazing Lease No. 10,159. John and Angela Heitz are the new lessees of Lease No. 10,159.

On August 7, 2009, the District Court issued an Order in the above-captioned matter: granting partial summary judgment to Appellee, C.A. Grenz; upholding DNRC's valuation of immovable lease improvements; but invalidating that portion of DNRC's lease improvement valuation procedure in ARM 36.25.125(3) concerning movable improvements; and ordering a hearing before the

District Court for a further determination of the moveable lease improvement values. On October 1, 2009, the Court clarified its August 7, 2009, Order and ordered the matter remanded to the agency for re-determination of the moveable lease improvement values.

DNRC appeals from the District Court's August 7, 2009 and October 1, 2009, orders invalidating DNRC's valuation of the movable improvements.

III. STATEMENT OF THE FACTS

In this instance, the valuation process proceeded exactly as required by §§77-6-302, -303, and -306, MCA, and ARM 36.25.125.

Mr. Grenz's lease expired on February 28, 2006. On March 8, 2006, Mr. Grenz was notified by the Department of his opportunity to either: remove improvements; or enter into a private agreement for the transfer of the improvements to the new lessee at an agreed price; or begin the arbitration process to determine the value of the improvements, or the improvement would become the property of the State of Montana within 60 days. See, Appendix, Affidavit of Kevin Chappell, ¶ 3, Admin. Rec. Doc. 1.

The new grazing lessees, John and Angela Heitz, described the improvements that they wished to acquire upon State Lease No. 10,159 and rejected other movable improvements. See, Admin Rec. Doc. 12, Affidavit of Kevin Chappell, ¶14. The former grazing lessee, Mr. Grenz asserted that the new

grazing lessees, John and Angela Heitz, should be obligated to purchase all of the moveable improvements upon the lease, not just the moveable improvements that the Heitzes wished to purchase. Affidavit of Kevin Chappell, ¶ 4, 5, and 6.

Because the former and new lessees could not agree as to the valuation of the improvements, they began the arbitration process. The new lessees, the Heitzes, appointed an arbitrator. See, Admin Rec. Doc. 7, Affidavit of Kevin Chappell, ¶9.

The former lessee, C.A. Grenz, appointed an Arbitrator. See, Admin Rec. Doc. 4, Affidavit of Kevin Chappell, ¶6. The two arbitrators, in turn, chose a third Arbitrator. See, Admin Rec. Doc. 8, Affidavit of Kevin Chappell, ¶10.

Subsequently, the three appointed Arbitrators produced a report on August 11, 2006 valuing the improvements chosen by the new lessee, Mr. Heitz, for retention upon the lease at $8,370. See, Appendix, Admin Rec. Doc. 14, Affidavit of Kevin Chappell, ¶16. This 24-page report described the improvements, provided photographs documenting their condition, and compared their asserted value with the value claimed the former lessee in the improvement reports submitted to the Department, as well as the value of the same improvements which had previously valued in September of 1995 when Mr. Grenz acquired this lease. Id.

This Arbitration panel found that the value of the improvements requested by the Heitzes were worth $8,370, which consisted of:

1) 2.5 miles of fence (1 mile on the north, 1 mile on the east and 1/2 mile on the south side of the section) - valued by the Arbitrators at $4,970;
2) the water well including the casing - valued by the Arbitrators at $3,100; and
3) the reservoir (or holding pond) - valued by the Arbitrators at $300.

The Arbitration panel stated that because Mr. Grenz had no receipts or actual documentation of the cost of the improvements (with the exception of the improvements request form submitted by Mr. Grenz to the Department), the Arbitration panel based its valuation upon the prior 1995 valuation as adjusted by the condition of the improvements and depreciated by their useful life. See, Admin Rec. Doc. 14, the August 11, 2006, Arbitration Panel Report at page 4, Affidavit of Kevin Chappell, ¶16.

The moveable improvements rejected for use by the new lessees, the Heitzes, were:

1) a fence on the west side of the Section;
2) a livestock water tank;
3) a corral with three gates and a loading chute; and
4) an electric water pump within the well, along with associated tubing and wiring.

Mr. Grenz argues that he is entitled to be compensated by the Heitzes for all the movable improvements that Mr. Grenz had placed upon the State land, not just the movable improvements that the Heitzes wished to acquire and use.

Mr. Grenz exercised his right to appeal the findings of the arbitration panel to the Department under §77-6-303(3), MCA. See, Admin Rec. Doc. 16, Affidavit of Kevin Chappell, ¶18. On May 29, 2008, the Department reviewed the Arbitrators' valuation of improvements and upheld the Arbitrators' valuation of the improvements. See, Admin Rec. Doc. 20, Affidavit of Kevin Chappell, ¶22.

Mr. Grenz, filed the above-captioned action in the Montana Sixteenth Judicial District Court in Garfield County, to challenge the Department's valuation of these improvements and the application of ARM 36.25.125(3).

In its motion for summary judgment before the District Court, DNRC asserted that its valuation of the improvements should be upheld because its administrative valuation: 1) rested upon substantial and credible evidence presented to the agency; and 2) the agency's valuation complied with the procedures provided by §§77-6-302, -303, and -306, MCA, and ARM 36.25.125.

In its August 7, 2009, ruling upon the motion for summary judgment, the District Court invalidated a portion of ARM 36.25.125, which authorizes the new grazing lessee to select which moveable lease improvements the new grazing lessee would like to acquire. Having expanded the scope of "movable

improvements" to be considered by the Department in a valuation, the District Court then, by its October 1, 2009 Order, remanded the moveable improvement valuation question back to DNRC for its resolution.

IV. THE STANDARD OF JUDICIAL REVIEW

In Clark Fork Coalition v. Montana Dept. of Environmental Quality, 347 Mont. 197 at 202-203, 197 P.3d 482 at 487 (2008), this Court described the standards for judicial review of an agency's non-MAPA administrative decision where the agency was called upon to interpret it's administrative rules:

> ¶ 19 Summary judgment is appropriate when there are no material facts in dispute and the movant is entitled to judgment as a matter of law. We review de novo a district court's ruling on a summary judgment motion, applying the same criteria as the district court. *Mont. Trout Unlimited v. Mont. Dept. of Nat. Resources & Conserv.*, 2006 MT 72, ¶ 17, 331 Mont. 483, ¶ 17, 133 P.3d 224, ¶ 17. We review the district court's conclusions of law to determine if they were correct. *Mont. Trout Unlimited,* ¶ 17. In this case, there are no material facts at issue.
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> ¶ 20 An agency's interpretation of its rule is afforded great weight, and the court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule. The agency's interpretation of the rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording. *Kirchner v. Mont. Dept. Pub. Health & Human Servs.*, 2005 MT 202, ¶ 18, 328 Mont. 203, ¶ 18, 119 P.3d 82, ¶ 18; *Juro's United Drug v. Mont. DPHHS,* 2004 MT 117, ¶ 12, 321 Mont. 167, ¶ 12, 90 P.3d 388, ¶ 12; *Easy v. Mont. DNRC,* 231 Mont. 306, 309, 752 P.2d 746, 748 (1988). Conversely, of course, neither this Court nor the district court must defer to an incorrect agency decision. *Juro's,* ¶ 12; *Grouse Mountain Assocs. v. Mont. Dept. of Pub. Serv. Reg.*, 284 Mont. 65, 69, 943 P.2d 971, 973 (1997).

> ¶ 21 We review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Johansen v. State,* 1999 MT 187, ¶ 11, 295 Mont. 339, ¶ 11, 983 P.2d 962, ¶ 11. In reviewing an agency decision to determine if it survives the arbitrary and capricious standard, we consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *North Fork Pres. Assn. v. Dept. of State Lands,* 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (quoting *Marsh v. Or. Nat. Resources Council,* 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989)). While our review of agency decisions is generally narrow, we will not "automatically defer to the agency 'without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.' " *Friends of the Wild Swan v. DNRC,* 2000 MT 209, ¶ 28, 301 Mont. 1, ¶ 28, 6 P.3d 972, ¶ 28 (quoting *Marsh,* 490 U.S. at 378, 109 S.Ct. at 1861) (hereinafter *Friends of the Wild Swan I*).

Id.

In Seven Up Pete Venture v. State, 327 Mont. 306, 313, 114 P.3d 1009, 1015 - 1016 (2005), this Court held that:

> ¶ 18 When resolution of an issue involves a question of constitutional law, this Court's review of the district court's interpretation of the law is plenary. *State v. Price,* 2002 MT 229, ¶ 27, 311 Mont. 439, ¶ 27, 57 P.3d 42, ¶ 27.
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> ¶ 19 This Court's review of a district court's grant or denial of a motion for summary judgment is *de novo. Watkins Trust v. Lacosta,* 2004 MT 144, ¶ 16, 321 Mont. 432, ¶ 16, 92 P.3d 620, ¶ 16. Thus, we apply the same Rule 56, M.R.Civ.P., criteria as applied by the district court. *Peyatt v. Moore,* 2004 MT 341, ¶ 13, 324 Mont. 249, ¶ 13, 102 P.3d 535, ¶ 13. Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Lacosta,* ¶ 16 (citing Rule 56(c), M.R.Civ.P.).

Consequently, this Court's review of the District Court's August 7, 2009 decision is *de novo*. Likewise, because the District Court's decision implicates fiduciary considerations for the administration of all State grazing leases, this Court reviews the legal conclusions of the District Court to determine whether they are correct.

V. SUMMARY OF ARGUMENT

A. The District Court erred by invalidating a portion of ARM 36.25.125, which allows new grazing lessees to determine what moveable improvements they wish to acquire upon the transfer of a grazing lease;

B. The District Court erred by ignoring the direction of §77-6-302(3), MCA, which requires the removal of any moveable improvement upon the termination of a lease, in the absence of arbitration or agreement.

C. Section 77-6-302(3), MCA, and ARM 36.25.125 promote the State's fiduciary administration of these trust lands by facilitating the transfer of grazing leases, and preventing anti-competitive practices by former lessees.

D. ARM 36.25.125 complies with Montana Statutes which direct the Lease Improvement Valuation Process.

VI. ARGUMENT

A. The District Court erred by invalidating a portion of ARM 36.25.125(3), which allows new grazing lessees to determine what moveable improvements they wish to acquire upon the transfer of a grazing lease.

There is no doubt that new State grazing lessees must acquire immovable improvement from the previous lessee. However, ARM 36.25.125(3), allows new

State grazing lessee the right to refuse to pay for moveable improvements upon the State grazing lease which they do not need or want.

Mr. Grenz argues that a previous grazing lessee may leave any number of moveable improvements upon a State grazing lease, and upon the termination of that State grazing lease, the new lessee must reimburse the previous lessee for the value of those improvements, despite their utility or need to the new lessee. The District Court erred by focusing upon a single sentence in §77-6-302, MCA: "[w]hen another person becomes the lessee of the lands, the person shall pay to the former lessee the reasonable value of the improvements".

The District Court's interpretation conflicts with §77-6-302(3), MCA, which provides for removal of movable improvements at the end of a lease:

> (3) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease.

The District Court's interpretation also conflicts with §77-6-303, MCA, which describes the conditions under which the new Lessee needs to compensate the former Lessee for improvements. It directs that:

> (1) In determining the value of these improvements, consideration shall be given to their original cost, their present condition, their suitableness for the uses ordinarily made of the lands on which they are located, and

> to the general state of cultivation of the land, its productive capacity as affected by former use, and its condition with reference to the infestation of noxious weeds. Consideration shall be given to all actual improvements and to all known effects that the use and occupancy of the land have had upon its productive capacity and desirableness for the new lessee.

(emphasis added).

ARM 36.25.125(3) clarifies that the new lessee has the discretion to refuse to purchase moveable improvements, since it provides that:

> (2) When the former lessee or licensee wishes to sell improvements and fixtures, and the new lessee or licensee wishes to purchase such improvements and fixtures, and the parties cannot agree upon a reasonable value, such value shall be determined by arbitration. When the new lessee or licensee does not wish to purchase the movable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately. Extensions for removing these improvements for good cause may be granted by the department.

(emphasis added). At the termination of a lease, the former lessee and the new lessee must resolve the question of the movable improvements. The movable improvements must either be removed from the lease by the former lessee; or where both parties wish to transfer possession to the new lessee - sold by private agreement or arbitration between the former and new lessee.

Section 77-6-303, MCA, directs that in order to be compensable to the former lessee, a movable lease improvement must be "desirable" for the new lessee. Thus, if a new lessee does not wish to acquire a movable lease

improvement, the former lessee must remove that movable improvement or that property is transferred to the State of Montana under §77-6-302(3), MCA.

B. The District Court erred by ignoring the direction of §77-6-302(3), which requires the removal of any moveable improvement upon the termination of a lease, in the absence of arbitration or agreement.

Although Mr. Grenz and Mr. Heitz arbitrated the value of certain movable and immovable improvements on this lease; other movable improvements were not arbitrated since the Heitzes indicated that they did not want them for the operation of the lease. This is a requirement of §77-6-302, MCA, which provides:

> (1) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease.

(emphasis added).

This same requirement is replicated in ARM 36.25.125(2):

> (2) It shall be the responsibility of the lessee or licensee to notify the new lessee or licensee of the improvements on the lease or licensed tract and the value of such improvements. Prior to the issuance of a new lease or license a new lessee or licensee shall prove that he has offered to pay or has paid the former lessee or licensee the value of the improvements and fixtures either as agreed upon with the former lessee or licensee or as fixed by arbitration or that the former lessee has decided to remove the improvements and fixtures from the lease or license. However, if the improvements and fixtures become the property of the state because the former lessee or licensee has failed to

> act within 60 days after expiration of the lease, then the new lessee or licensee shall not be required to prove that he (she) has offered to pay the former lessee or licensee for such improvements and fixtures. The department may require a written notice from the former lessee or licensee stating that he has been paid for or is removing the improvements and fixtures. If the former lessee or licensee does not agree on the value of the improvements and fixtures or begin arbitration procedures within 60 days after the expiration of the lease or license, then all improvements and fixtures remaining shall become the property of the state. This applies to permanent as well as movable improvements. The 60-day period for removal of improvements may be extended by the department upon proper written application.

The requirement to arbitrate or remove improvements within 60 days of the expiration of a State grazing lease was the result of this Court's ruling in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs. (Montrust I), 296 Mont. 402 at 418, 989 P.2d 800 at 809 (1999), which struck down former §§77-6-304 and -305, MCA, as unconstitutional. These former statutes: 1) prohibited any transfer of a State agricultural lease before the improvements had been arbitrated; and allowed the former lessee 60 days to come onto the state lands—without payment to the State— to remove any improvements. The Court held that both provisions violated the State's trust duty to manage these lands in the best financial interests of the school trust beneficiaries:

> . . . we conclude that allowing former leaseholders up to sixty days to remove movable improvements without charge similarly denies the trust's beneficiaries "the full benefit" of the trust lands. *Lassen,* 385 U.S. at 468, 87 S.Ct. at 589, 17 L.Ed.2d at 522. Further, §77-6-304, MCA, violates the duty of undivided loyalty by benefiting third

parties to the detriment of the trust's beneficiaries. We hold that §77-6-304, MCA, is unconstitutional on its face.

In allowing trust lands to idle indefinitely while former and new lessees determine the value of improvements, §77-6-305, MCA, is inconsistent with the trust's mandate that full market value be obtained for school trust lands. We hold that the specific requirement in §77-6-305, MCA, that a new lease will not issue until the new lessee shows that the old lessee has been paid the value of his improvements is unconstitutional on its face.

Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs (Montrust I), 296 Mont. 402 at 418-419, 989 P.2d 800 at 809-810 (Mont.,1999)

Subsequently, the 2001 Legislature in §7, Ch. 270, L. 2001, repealed §§77-6-304 and -305, MCA, and in §5, Ch. 270 L. 2001, amended §77-6-302, MCA, to read as follows:

77-6-302. Compensation for improvements -- actual costs. (1) When another person becomes the lessee of the lands, the person shall pay to the former lessee the reasonable value of ~~these~~ the improvements ~~at the time the new lessee takes possession~~. The reasonable value may not be less than the full market value of the improvements.

(2) If the former lessee is unable to produce records establishing the reasonable value or if the former lessee and the new lessee are unable to agree on the reasonable value of the improvements, the value must be ascertained and fixed as provided in 77-6-306. The former lessee shall initiate this process within 60 days of notification from the department that there is a new lessee. Failure to initiate the process within this time period results in all improvements becoming the property of the state.

(3) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements

from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease."

The 2005 Montana Legislature further amended §77-6-302 in Sec. 1, Ch. 476, L. 2005, to read as follows:

77-6-302. Compensation for improvements -- actual costs. (1) Prior to renewal of a lease, the department shall request from the lessee a listing of improvements on the land associated with the lease, including the reasonable value of the improvements. This information must be provided to any party requesting to bid on the lease. When another person becomes the lessee of the lands, the person shall pay to the former lessee the reasonable value of the improvements. The reasonable value may not be less than the full market value of the improvements.

(2) If the former lessee is unable to produce records establishing the reasonable value or if the former lessee and the new lessee are unable to agree on the reasonable value of the improvements, the value must be ascertained and fixed as provided in 77-6-306. The former lessee shall initiate this process within 60 days of notification from the department that there is a new lessee. The department notification must include an explanation of the requirements of 77-6-306. Failure to initiate the process within this time period results in all improvements becoming the property of the state.

(3) Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease.

Mr. Grenz was granted his tenure under Lease No. 10,159 on March 1, 1996. Paragraph 22 of the Lease directs that: "[t]he lessee agrees to comply with all applicable laws and rules in effect at the date of this lease, or which may, from time to time, be adopted". Accordingly, Mr. Grenz was obligated to follow the improvement procedures which resulted from the Montrust I decision and the subsequent legislative amendments of §77-6-302, MCA.

C. Section 77-6-302(3), MCA, and ARM 36.25.125(3) promote the State's fiduciary administration of these trust lands by facilitating the transfer of grazing leases, and preventing anti-competitive practices by former lessees.

In Evertz v. State, 249 Mont. 193, 198, 815 P.2d 135, 139 (1991), this Court recognized that former lessees could wrongly "chill" the bidding process on State grazing leases by their manipulation of the lease improvement valuation process. By inflating the costs of lease improvements beyond reasonable limits, a former lessee could deter competitive bidding and discourage other potential applicants from submitting any bids upon the State leases when those leases came due for competitive bidding. In such instances, the ability of the school trust to obtain the constitutionally-required "full market value" of the grazing lease can be destroyed. See, Article X, §11 1972 Montana Constitution; Montrust I, *supra*.

By placing unlimited amounts of movable improvements upon a grazing lease, a former lessee harms the ability of the school trust to obtain competitive

bids for a lease, if the new grazing lessee must reimburse the former lessee for all those movable improvements. Where a new grazing lessee does not need or want additional movable improvements, the mandate that the new lessee pay for those useless improvements only serves to inhibit good stewardship of the land, reduces economic efficiency, and impedes any transfer of the lease. More importantly, such a mandate would entrench the former lessee in possession of the lease and lower the resulting lease revenues for affected trust beneficiaries.

ARM 36.25.125(3) eliminates any potential manipulation of the lease improvement valuation process, by requiring both the former lessee and the new lessee to agree to a sale of moveable improvements. If the new lessee does not want to acquire an extra fence or water pump, the new lessee does not have to expend acquisition funds with no economic benefit in return. In this way, applicants for State grazing leases can afford to submit higher grazing lease bids, which financially benefit the school trust. Under this Land Board policy, individual bidders can be creative in their operation of leases, and determine for themselves how they will profitably operate a State grazing lease.

Thus, ARM 36.25.125(3) is not only within the scope of §77-6-303(1), MCA, it is a practical measure designed to increase the stream of revenue from school trust lands, and allow new lessees to operate State grazing lands in a more flexible and profitable manner.

D. ARM 36.25.125 complies with Montana Statutes which direct the Lease Improvement Valuation Process.

The District Court erred by determining that DNRC misconstrued the lease improvement valuation procedures and that ARM 36.25.125(3) was adopted outside of the Land Board's rulemaking authority.

Under this Court's ruling in Clark Fork Coalition v. Montana Dept. of Environmental Quality, 347 Mont. 197 at 202-203, 197 P.3d 482 at 487 (2008), the DNRC's interpretation of valuation procedures under the Land Board's rule ARM 36.25.125 should be "afforded great weight, and the court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule". As this Court stated: "[t]he agency's interpretation of the rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording". Id.

Section 2-4-305(5), MCA, states that: "[t]o be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law". Montana law clearly authorized the Land Board's adoption of ARM 36.25.125(3) which clarifies that a new lessee has the discretion to refuse to purchase moveable improvements on a State grazing lease.

Section 77-6-303(1), MCA, directs that:

> ...Consideration shall be given to all actual improvements and to all known effects that the use and occupancy of the land have had upon its productive capacity and desirableness for the new lessee....

(emphasis added).

In §77-6-303(1), MCA, the legislature has directed that there are three criteria to be met if an improvement is to be considered compensable. First, is it an actual improvement? Second, does it improve the productivity of the land? Third, and most importantly, is it also something that the new lessee wants to use?

The legislative grant of rulemaking authority to the Land Board via §77-1-209, MCA, also granted additional discretion to the board to adopt leasing rules that the Board considers necessary. Section 77-1-209, MCA, directs that:

> **77-1-209. Leasing rules.** The board may prescribe rules relating to the leasing of state lands as it considers necessary in order that the use and proceeds of these lands may contribute in the highest attainable measure to the purposes for which they are granted to the state of Montana. The rules should prescribe a procedure for setting all fees and rental rates for the use of state lands for any purpose. The procedure should establish provisions for notice, public comment, public hearings, and appeal.

(emphasis added).

Section 77-1-209, MCA, grants abundant administrative discretion to the State Land Board to adopt leasing rules and thereby determine procedures for the transfer of grazing leases and the valuation and payment for improvements on those leases. The Board also possesses direct Constitutional authority over the

leasing of State trust lands under Article X, §4 of the 1972 Montana Constitution. (The land board . . . "has the authority to direct, control, lease, exchange, and sell school lands . . .".). Thus this Court should recognize the expansive authority of the Land Board to adopt ARM 36.25.125(3).

Generally, where a Board possesses additional legal authority over the subject matter, delegations of legislative authority are less stringently scrutinized. See, Duck Inn, Inc. v. Montana State University-Northern, 285 Mont. 519, 949 P.2d 1179 (Mont.,1997)(Limitations on legislative delegation are less stringent in cases where entity exercising delegated authority itself possesses independent authority over the subject matter.); but see, Winchell v. Montana Dept. of State Lands, 262 Mont. 328, 333, 865 P.2d 249, 252 (1993)(The broad discretionary powers of DSL are not without limit and are defined by the parameters of statutory requirements enacted by the legislature.)

In order to determine the scope of legislative authority granted to the Land Board in adopting ARM 36.25.125, the Court should examine three lease improvement valuation statutes, §§77-6-302, -303, and -306, MCA, in a harmonious and comprehensive manner in an effort to give effect to every word. City of Polson v. Public Service Commission155 Mont. 464, 469, 473 P.2d 508, 511 (Mont. 1970) ("It is a basic rule of law that the Commission, as an administrative agency, has only those powers specifically conferred upon it by the

legislature and in determining those statutory powers this Court must give effect to every word, phrase, clause or sentence therein, if it is possible to do so".); §1-2-101, MCA.

This Court held in Christenot v. State, Dept. of Commerce, 272 Mont. 396 at 400-401, 901 P.2d 545 at 548 (Mont.,1995):

> An administrative regulation may be overruled as "out of harmony" with the applicable legislative guidelines only upon a clear showing that the regulation adds requirements which are contrary to the statutory language or that it engrafts additional provisions not envisioned by the legislature. *Board of Barbers, Etc. v. Big Sky College, Etc.* (1981), 192 Mont. 159, 161, 626 P.2d 1269, 1270-71
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> An administrative agency's interpretation of a statute under its domain is presumed to be controlling. *Norfolk Holdings v. Dept. of Revenue* (1991), 249 Mont. 40-44, 813 P.2d 460, 462. In fact, the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong. *Red Lion Broadcasting Co. v. FCC* (1969), 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 384.

See also, U.S. West, Inc. v. Department of Revenue, 343 Mont. 1, 5, 183 P.3d 16, 19 (2008)("Ordinarily, we give deference to the statutory interpretation advanced by the agency charged with administering the statute".); Kuhr v. City of Billings, 338 Mont. 402, 413-414, 168 P.3d 615, 623 (Mont.,2007)("An administrative rule will be considered invalid 'only upon a clear showing that the regulation adds requirements which are contrary to the statutory language or that it engrafts additional provisions not envisioned by the legislature'.")

The District Court's interpretation of ARM 36.25.125(3) and §77-6-303(1), MCA, is inconsistent with these interpretative principles because there are no compelling indications that the agency's construction of the statute is wrong; and there is no "clear showing that ARM 36.25.125(3) adds requirements which are contrary to the statutory language or that it engrafts additional provisions not envisioned by the legislature", as required by Christenot v. State, Dept. of Commerce and Kuhr v. City of Billings, supra.

The "desirableness" of a moveable improvement for future use under §77-6-303(1), MCA, cannot be determined objectively by a disinterested administrative agency. Just as every tract of land is unique, the equipment needs of each new grazing lessee are unique. Why must a new State lessee purchase an additional water pump from a prior State lessee if the new State lessee already owns a more efficient water pump?

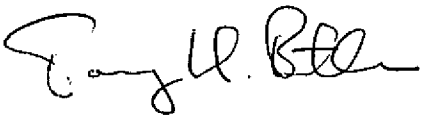
This Court should conclude that the State Land Board's Administrative Rule, ARM 36.25.125(3) is clearly within the delegation of legislative authority granted to the State Board of Land Commissioners. ARM 36.25.125(3) does not conflict with Montana statute, given that: 1) the language of §77-6-303(1), MCA, directs that the "desirableness" of the improvement for the new lessee must be considered; and 2) the agency's interpretation of this statute is granted deference unless there are compelling indications that the agency's interpretation is wrong;

and 3) the Land Board has strong fiduciary considerations to support its adoption of ARM 36.25.125(3) as part of the lease improvement valuation procedures.

CONCLUSION

The DNRC respectfully requests that this Court: uphold DNRC's valuation of both the immovable and movable improvements upon State Lease No. 10,159; reverse the District Court's partial grant of Summary Judgment to Mr. Grenz under Rule 56, M.R.Civ.P.; declare that ARM 36.25.125 is consistent with the direction of § 77-6-302, -303, and -306, MCA; and dismiss the Petition of Mr. Grenz with prejudice.

DATED this 7th day of April, 2010.

By: 

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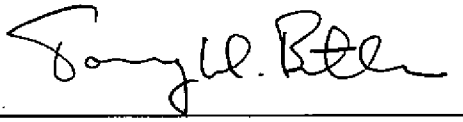
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d), M.R.App.P., I certify that this brief is printed with a proportionally spaced Times New Roman text typeface of 14 points, is double-spaced and the word count calculated by Microsoft Word software for Windows is not more than 10,000 words and not averaging more than 250 words per page, excluding the Certificate of Service and Certificate of Compliance.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPELLANT, STATE OF MONTANA'S APPEAL BRIEF AND APPENDICES was served by mail, postage prepaid, upon the following on the 7th day of April, 2010:

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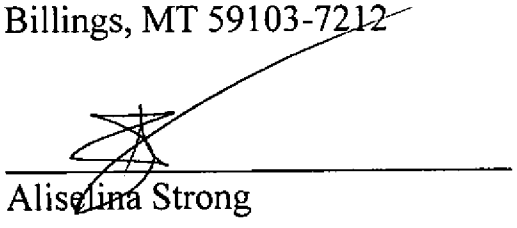

Aliselina Strong